IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BETTY ANN MARSEE, Administratrix of the Estate of MARVIN SEAN MARSEE, Deceased,

Plaintiff,

vs.

UNITED STATES TOBACCO CO., a New Jersey corporation,

Defendant.

No. Civ-84-2777R

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
Wednesday, June 18, 1986

Appearances:

HON. DAVID L. RUSSELL,
U.S. District Judge, Presiding

GEORGE W. BRALY, Esquire
DANIA DESCHAMPS-BRALY, Esquire
Braly & Braly
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Appeared for Plaintiff.

TIMOTHY M. FINNEGAN, Esquire
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and
ALSTON JENNINGS, Esquire
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and
ANDY COATS, Esquire
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Appeared for Defendant.

Volume 34

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Maynard E. Peterson, CSR
Acting Official Reporter

BE IT REMEMBERED, that on the 18th day of June, 1986, the above matter coming on for jury trial before the Honorable David L. Russell, United States District Judge for the Western District of Oklahoma, and the parties appearing in person and or by counsel as hereinabove set forth, the following proceedings were had:

MORNING SESSION

Wednesday, June 18, 1986

(The following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY.)

THE COURT: Mr. Braly, is there anything that we need to take up before we bring in the jury?

MR. BRALY: No, I don't think so. We intend on finishing with Doctor Byers and calling Mrs. Marsee, and then we are going to call Kent Westbrook. He's on his way over, but he may not get here before then, Judge.

THE COURT: This will be fine.

If you need to make any further record, I

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didn't mean to treat you with short shrift last night at all in regard to the witnesses. If you want to make a further record, we certainly --

MR. BRALY: If the Court would allow us when we get through with Betty this morning, because we are going to be waiting on Doctor Westbrook, I could take a few minutes after that to make a record on that and use that time for making an offer of proof that the --

THE COURT: That will be fine.

MR. JENNINGS: If the Court please, I have just been advised that apparently they intend to recall Doctor Westbrook as a rebuttal witness.

MR. BRALY: Yes.

THE COURT: That's what they said.

MR. JENNINGS: Doctor Westbrook has testified in this lawsuit. Will we be permitted to recall any of our witnesses?

THE COURT: I'll tell you what, before he testifies, just agree with Mr. Braly we would take up any witnesses that they intend to call. I think I have delineated the areas that would be appropriate to cover. I think counsel on both sides knows that rebuttal is a proper part of the trial, but a plaintiff is expected to bring their case and unless

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there is something unusual has to bring their case in their case in chief. If there is some surprise or something they couldn't anticipate which arises during the defense case, they are entitled to rebut that, and perhaps Mr. Westbrook has rebuttal testimony, and he will be limited to that.

MR. BRALY: Judge, I advised him of what the Court said yesterday about focusing on this aspect of this being the same disease in young people as it is in old people, and that's what I intend to ask him about.

MR. JENNINGS: To which he's already testified --

MR. FINNEGAN: He's already testified to that, --

MR. JENNINGS: -- specifically.

MR. FINNEGAN: -- Your Honor.

THE COURT: We will take that up before he testifies.

MR. JENNINGS: Fine.

THE COURT: Doctor Byers, you may resume the stand.

THE WITNESS: Do I have to take the oath again?

THE COURT: You are under the same oath you

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were under yesterday.

(The following proceedings were had IN THE PRESENCE AND HEARING OF THE JURY.)

THE COURT: Good morning, ladies and gentlemen. I am sorry to keep you waiting. We had a criminal case and it took a little longer than I expected.

Mr. Braly, you may cross-examine.

ROBERT M. BYERS, M.D.,

resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. BRALY:

Q. Good morning, Doctor Byers.

A. I hope so.

Q. Doctor, did I hear you say yesterday that your son was a dipper?

A. Yes, sir.

Q. Did I also hear you say that you were looking at his mouth frequently?

A. Well, I wouldn't say "frequently."

Q. More than once or twice?

A. Oh, I'd say yes, once or twice.

Q. What were you looking at, Doctor?

A. Well, he started in high school, age 16. He's been doing it for about six years off and on,

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not steady, and I was curious to see if this -- you know, when you look in the mouth you see this kind of thickened area, and he had stopped probably about four months ago, hadn't been using it.

I was just curious to see if the area had disappeared, whether there was any regression of this particular change in the area where he puts the snuff, and sure enough, there was hardly -- his mouth looks as clean as mine does right now.

Q. So if you quit using snuff, these lesions you get will sometimes go away?

A. I don't know. I am just basing it on what I saw with my son. I haven't had any firsthand knowledge other than his -- than him.

Q. Doctor, didn't you say yesterday that you had examined his oral cavity many times?

A. I don't recall that, no.

Q. Weren't you looking in it because you were concerned that that lesion might be turning malignant?

A. No.

Q. You weren't. Did you know that the World Health Organization considers those leukoplakias to be precancerous lesions?

A. I didn't call it leukoplakia.

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Q. You called it a white spot?
A. No.
Q. What did you call it?
A. Just a little thickened area in the area where he put his -- just like a little callus.
Q. All right. But, at any rate, you looked in his mouth as you put it yesterday, in his oral cavity, you examined his oral cavity many times?
A. Just his area where he put the snuff.
Q. Doctor, is the tongue bathed in saliva?
A. I hope so.
Q. If you stick your tongue out and put Kleenex on it, the Kleenex is going to be wet with saliva, isn't it?
A. Usually, unless it is like mine with the cotton mouth that I have.
Q. Doctor, I promise not to ruin your day today.
A. Okay, thank you.
Q. And if you put that piece of Kleenex over on the right side of the tongue, it would be wet, it would be wet if you put it over on the left side of the tongue, wouldn't it?
A. Yes.
Q. The saliva goes all over the inside of the

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oral cavity and bathes the entire inside of the oral cavity, doesn't it?

A. Not only -- yes, I will say "yes" to that. The thing has salivary glands all over the oral cavity that secrete the mucous.

Q. You would expect, wouldn't you, that any tobacco juice that is mixed with saliva would also go all the over the inside of the oral cavity?

A. Possibly, yes.

Q. In the study that was published about the people with tongue cancers, the young people with tongue cancers, what year was that paper published? Do you recall?

A. Which paper?

Q. The one on tongue cancers in young people.

A. The one that I wrote?

Q. Yes.

A. 1975, I think.

Q. And what year did you first go to M.D. Anderson?

A. 1970.

Q. And what period of time was included with those patients?

A. '56 through '73, I think.

Q. So most of those patients were patients that

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you never saw yourself?

A. As I testified -- I think there was two that I personally was involved in. That's what stimulated -- I think I said yesterday what stimulated my interest to go back and review. The rest of the patients, the nine others, were handled by Doctors Jesse and Ballentine and other members of the department.

Q. Doctor Richard Jesse?

A. Yes, sir.

Q. He wrote the introductory chapter to this book, didn't he?

A. I -- is that the book by Suen and Myers? Yes.

Q. The book says, at page 303, with respect to the etiology of oral cavity cancer that -- and it has got a section that says "Tobacco." Underneath it, it says, "The incidence of oral squamous cancer is directly related to the use of tobacco in any form."

Do you recall that, Doctor?

A. No.

Q. That's in this book that Doctor Jesse -- Doctor Jesse was at M.D. Anderson, wasn't he?

A. Yes, sir. Who was the author of that statement?

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Q. Have you ever heard of an Elliott W. Strong?

A. Yes, sir.

Q. Who is Elliott W. Strong?

A. He is the chairman of the -- I don't know if it is a department or section, but the head and neck division or section or whatever at Memorial Sloan-Kettering.

Q. In New York City?

A. Yes, sir.

Q. It is kind of a rival institution in the care of cancer patients in M.D. Anderson, isn't it?

A. Gosh, I hope not. We have some friendly discussions, but I wouldn't say we are -- we hope we are cooperative and complementary.

Q. Certainly Doctor Strong knows what he's talking about in this area, wouldn't he?

A. I would think so -- I would -- Sure, he does, you bet.

Q. Doctor, you are not telling this jury that tobacco does not cause oral cavity cancer, are you?

A. I'm telling you that I don't think that the snuff that was used by Sean Marsee caused his squamous carcinoma of his oral tongue.

Q. The answer to my question though, Doctor, in general, you are not telling this jury that tobacco

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does not cause oral cavity cancer?

A. I would have to say the answer to that is yes, I'm telling you that I don't think it causes it.

Q. Not at all?

A. No, I have to qualify that.

Q. Doctor, do you agree with the statement of the Surgeon General of the United States that the scientific evidence is strong that the use of snuff causes cancer in humans?

A. I'm familiar with the statement saying that the prolonged use of snuff is associated with a low-grade verrucous or squamous carcinoma of the buccal-gingival sulcus and cheek, and it's always referred to as the oral cavity, but if you be more specific, it always comes down to the buccogingival sulcus and cheek. There is never any mention of tongue.

Q. Not anywhere in the literature?

A. In young patients that dip snuff.

Q. Not anywhere in the literature are tongue cancers associated with the use of snuff or tobacco?

A. Yes, there is plenty of articles that imply that, yes.

Q. Doctor, my specific question is you have seen the Surgeon General's report on snuff dipping?

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A. I don't think so. I haven't been totally apprised of all those proceedings, no.

Q. Have you read the National Institutes of Health consensus development conference statement on snuff?

A. I may have, but I don't recall it in detail.

Q. Let me show you what has been marked as Exhibit 11, ask you to take a look at Paragraph 2 of the preface.

A. Shall I read it out loud, or are you just --

Q. Would you read that first sentence.

A. "The scientific evidence is strong that the use of snuff can cause cancer in humans. The evidence -- "

Do you want me to go on?

Q. No, that's fine. My question is do you agree with that statement by the Surgeon General of the United States?

A. Qualified by again repeating the buccogingival sulcus in longstanding users of snuff.

Q. Doctor, in the study done by Doctor Winn, did you know that you found overall increased risk for cancer of the oral cavity besides the buccal-gingival group?

A. Yes, I think she recorded something like a

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90 percent incidence of the buccal mucosa than you can buccogingival sulcus and maybe a 22 percent or 20 percent incidence of perhaps associated other sites, but she wasn't specific.

Q. Doctor, have you looked at the article by Doctor Bloodgood all the way back to 1921 in the Journal of the American Medical Association?

A. Yes, I got a copy of it right here.

Q. Did you get that recently?

A. You bet.

Q. Okay. Do you know that he talks about tongue cancer as being a preventable disease?

A. That's the title of his article.

Q. Yes, sir. Now, Doctor, have you looked at the article by Doctor McGuirt?

A. Yes, sir, I have it right here.

Q. You have got it in front of you?

A. Yes, sir. It is called "Snuff Dipper's Carcinoma."

Q. And he has a number of those series of those patients, doesn't he, that he attributes the cancer to snuff?

A. Well, he looked at a large, fairly large number. Again, 290, according to this, which is a synopsis of the article. 290 patients with oral

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cavity and oropharyngeal tumors, 57 of which use snuff exclusive of other known oral carcinogenic agents. In only one of those patients was the tumor outside of the buccal-gingival sulcus, and that was in the floor of the mouth.

Q. Doctor, do you see in the middle column where he says, "The duration of snuff use ranged from 10 years to 75 years"?

A. Let's see.

Q. Middle column.

A. "The duration of snuff usage ranged from 10 to 75 years, with 75 percent of the patients admitting that they had dipped for longer than 40 years."

So I say the majority by far were in the high duration group.

Q. But they weren't all -- some of them had dipped for --

A. Some of them ten years.

Q. Did you know that Doctor Furst, an expert witness for the tobacco company, helped me build a graph yesterday that based on information from the tobacco company indicated that Sean Marsee had used an amount of snuff that was the equivalent of a typical 16-year snuff dipper? Did you know that?

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A. I have no knowledge of that.

Q. Doctor, what knowledge do you have about nitrosamines that are in snuff?

A. Just that.

Q. Just that they are there?

A. Correct.

Q. Do you know how potent those are as carcinogens?

A. No. And I wasn't -- first of all, let me back up. I am not sure they are carcinogens, but if they are carcinogens, I am not sure how potent they are. They may be carcinogens; they may not. I am not an expert to testify on that. If you say they are carcinogens, that's your opinion.

A. I am not making an opinion one way or the other.

Q. Have you in any way investigated the literature to see what the results have been in experiments that have been done with animals with nitrosamines?

A. No. The only thing I know of there's two studies done by Peacock and Smith in which they used the actual snuff itself, not a component, and they found over a year, and I think it was hamsters and monkeys, I think it was, and one used it for seven

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years. I think Smith used it in monkeys for seven years and found no relationship, and Peacock, I think, used it in hamsters for a year and found no relationship. Those are the only two studies that I am anywhere cursory aware of. I don't know -- I know nothing about the nitrosamine literature.

Q. Doctor, are you aware that the expert witness on this subject for the tobacco company yesterday, Doctor Furst, said that a recent experiment was the best animal experiment that had ever been done where they put snuff in the lip canal that had been formed?

A. No, I'm not aware of that.

Q. Were you aware that when he got through testifying that that was the very best one of these experiments that had ever been done that we had in terms of contact with the skin and duration?

MR. JENNINGS: If the Court please, may we approach the bench?

(The following proceedings were had AT THE SIDE BAR.)

MR. JENNINGS: If the Court please, counsel is well aware that the rule is in effect that this witness could not possibly have heard the testimony of Doctor Furst and that we are not permitted to

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advise him of what Doctor Furst's testimony was, and these questions are being asked solely for the purpose of arguing to the jury what Doctor Furst's testimony was, not for any purpose in cross-examining this witness, and I object to it.

MR. BRALY: Judge, I am just trying to test how much the witness doesn't know about snuff and the levels of nitrosamines in the snuff, I think demonstrating his profound lack of knowledge on that and details to the jury.

THE COURT: I think it would be appropriate for counsel to inquire about nitrosamines, and I assume where he's leading is if that would make a difference in his opinion if he knew what some of the other studies showed, and I will overrule your objection.

MR. JENNINGS: If the Court please, --

THE COURT: Go ahead. I'm sorry. I didn't mean to cut you off.

MR. JENNINGS: If the Court please, he's talking about specifically what -- he's not testing this witness. He's trying to get before the jury again what another witness testified to. It is perfectly -- I agree it is perfectly proper for him to ask him what he knows about nitrosamines, but not

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what Doctor Furst knows about nitrosamines.

MR. BRALY: The other experts are perfectly free to inquire about factual information for the basis of their opinion, whether the rule is called or not.

THE COURT: I will overrule the objection.

MR. JENNINGS: All right. Thank you.

(The following proceedings were had IN OPEN COURT.)

Q. (BY MR. BRALY) Doctor, back to where we were. Were you aware that Doctor Furst, who is one of the tobacco company experts yesterday, said there was not -- the experiment that had been done, that was the best experiment that had ever been done in snuff in animals, that it had the longest contact, the most intimate contact, where they put snuff in a canal created inside the moist part of the lip.

A. What kind of animal was it?

Q. They were done in laboratory animals, rats, I believe.

A. Rats.

Q. And that this was changed on a daily basis, sometimes twice a day, and that after all this had been done, when he sat down and calculated the exposure that the animal got to nitrosamines, that

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they found out that the animals' exposures to nitrosamines in snuff in these kind of animal experiments was about 10 percent of what a human would get dipping snuff like Sean Marsee did for six years? Were you aware of that?

A. Of course not.

Q. Okay. So you really don't know anything about the adequacy of the animal experiments that have been done then, do you?

A. The adequacy of the animal experiments?

Q. Yes, whether the experiments even by design had a chance of properly measuring the effects of the nitrosamines.

A. I don't know. I wouldn't even be able to comment on the adequacy of that study.

Q. Doctor, I take it then that you are also not aware that nitrosamines, according to the testimony in this case by Doctor Lijinsky of the NCI Frederick Cancer Center, Doctor Hecht and Doctor Hoffmann of the American Health Foundation, are carcinogens that act systemically through the body. Were you aware of that?

A. No.

Q. That they can be metabolized by the mucous membranes from different parts of the oral cavity.

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Were you aware of that?

A. No.

Q. Were you aware that one of the nitrosamines that is found in snuff in a dose response study has been shown to be a cause of squamous cell carcinoma of the tongue in laboratory animals?

A. No, but you're quoting out of context or whatever. I would like to see verse -- I mean I will take your word for it, because that's the kind of person I am, but in reality I don't know what you are saying. I don't even know what studies you are talking about, let alone whether there is any scientific merit to them.

Q. Did you know that Doctor William Lijinsky was the head of the National Cancer Institute's Frederick Cancer Research Laboratory?

A. No.

Q. Did you know that he had been in the business of testing chemicals as carcinogens since the 1950's?

A. No.

Q. Doctor, do you have any idea of what the levels of nitrosamines are that are in snuff?

A. No.

Q. Do you have any idea what the levels of

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nitrosamines are in any other product designed to go into the mouths of human beings?

A. No.

Q. Not having any of that knowledge, I take it that you were not able to consider any of those matters in reaching the opinions that you have expressed to this Court and this jury.

A. No.

MR. BRALY: That's all, Your Honor.

MR. JENNINGS: No further questions.

THE COURT: You may step down, and you are excused.

THE WITNESS: Thanks a lot. If I had known it was going to be that short, we would have finished it last night.

MR. BRALY: I told you I wasn't going to ruin your day.

We will recall Betty Marsee to the stand briefly.

THE COURT: The defendant hasn't rested. Does the defendant have any further witnesses?

MR. JENNINGS: Excuse me, Your Honor.

MR. BRALY: I anticipated, Your Honor.

MR. JENNINGS: May we approach the bench?

(The following proceedings were had AT THE SIDE

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BAR.)

MR. JENNINGS: If the Court please, we will ask the Court to take judicial notice of the recent statute passed by Congress that requires warnings on snuff beginning, I think, in 1987, and instruct the jury in regard to that statute; and other than that, we rest.

MR. BRALY: We object, Your Honor. It is not relevant to any issue in this case.

MR. JENNINGS: It has been discussed at length by the witnesses, Your Honor. We want the exact statute in evidence, I mean before the jury. It is a matter which the Court can take judicial notice of. It has been testified to.

THE COURT: It has been testified to, but as far as are you suggesting in the Court's instructions that the Court should instruct on it?

MR. JENNINGS: I think the Court has the implied duty that judicial notice in a proceeding, to tell the jury, not as part of the instructions in connection with the consideration of the case, but as part of the record in the case what the statute provides.

MR. BRALY: What issue is this relevant to?

MR. JENNINGS: It is relevant to the fact

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that there's been testimony from your witnesses and from our witnesses about the statute, and it needs to be before the jury so they know what these people testified about.

MR. BRALY: Well, --

MR. COATS: It is certainly also relevant to the question of punitive damage, the question that there is indeed a warning.

MR. JENNINGS: There hasn't been one up until now. There hasn't been any requirement up until this time.

MR. COATS: Now there is.

MR. JENNINGS: Now there is.

MS. DESCHAMPS-BRALY: Your Honor, the fact that Congress has mandated that they put the warnings on there does not excuse their past and present actions in not doing something. It's not Congress's responsibility to tell them to put a warning label on. It was their responsibility when they became aware that --

THE COURT: I don't think there is any suggestion that that changes their responsibility.

There has been some testimony about it. I don't remember who it was by.

MR. BRALY: I do. It was expressed by the

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Chairman of the Board Bantle and in passing if he ever put a warning on his product. He said no, they were to put on warnings next year.

But I said, "You haven't put one on voluntarily, have you?"

And he said, "No, we haven't."

MR. JENNINGS: That is testimony that they put on, Your Honor. You put on the deposition; you didn't object to that testimony. You got it in evidence in this case. We didn't.

THE COURT: What is the relevance for me to advise the jury as to, that is in evidence, and you can obviously comment on it in closing argument, in evidence, but to actually read to the jury the statute or to advise them what the law is, what is the relevance of that?

MS. DESCHAMPS-BRALY: Mr. Coats just said it goes to punitive damages. I don't see where it goes to punitive damages at all, because --

MR. COATS: Obviously.

MS. DESCHAMPS-BRALY: -- punitive damages goes to past and present actions.

MR. COATS: The argument would be that they need to publish and make the loud announcements around the world to prevent us -- to cause us to put

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a label on the product. We also have --

THE COURT: On one side you have taken the position, which I have agreed with, that anything that happened after the death of Sean Marsee is not relevant as far as punitive damages or anything else in the case, so why would this be relevant?

MR. JENNINGS: If the Court please, they have used the Surgeon General's record that came out April 1, 1986.

THE COURT: On the issue of causation --

MR. COATS: I understand, but it is in evidence.

MR. FINNEGAN: If the Court please, they also used lobbying activities that went after the death of Sean Marsee.

THE COURT: If they did, it was not because I knew it, because I think I attempted to keep that out.

MS. DESCHAMPS-BRALY: I believe the dates that you permitted were prior to the death.

MR. JENNINGS: If the Court please, Mr. Braly has argued with a number of witnesses that there was a requirement that they -- that the U.S. Tobacco Company give notice of the fact that they had nitrosamines in their product. I think that the jury

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is entitled to know what warnings are required by the statute that --

MR. BRALY: I haven't --

MR. JENNINGS: Oh, you have.

MR. BRALY: We expressly take the position that it is the manufacturer's responsibility to provide adequate warnings, it is not Congress's responsibility. This is something that each manufacturer is supposed to do. The only reason Congress ever gets involved in it is when some manufacturer like the U. S. Tobacco Company shirks its duty.

THE COURT: I will think about it. My inclination right now is it did happen -- I think it cuts both ways, this time frame, and my inclination would be that it should not be further -- it is in evidence, and I really don't know what difference it is going to make reading or not reading it, because the jury knows it right now. I will overrule your objection.

MR. FINNEGAN: Do you want a copy of that?

THE COURT: Yes.

Do you have any further evidence?

MR. JENNINGS: No, Your Honor. We want the record to show that we have requested the Court to

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take judicial notice of the statute and to inform the jury of its contents.

THE COURT: Thank you.

MR. JENNINGS: And with that we rest.

MS. DESCHAMPS-BRALY: Are we still having another jury instruction conference?

THE COURT: I think Cary wants you to, yes.

(The following proceedings were had IN OPEN COURT.)

THE COURT: Now, ladies and gentlemen, the defendants have now rested their case, and it becomes the opportunity now for the plaintiff to offer what is called rebuttal evidence.

Mr. Braly.

MR. BRALY: Thank you, Your Honor. We will briefly recall Betty Ann Marsee to the witness stand.

BETTY ANN MARSEE,

recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. BRALY:

Q. Mrs. Marsee, do you recall the testimony of Spencer Martin?

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A. Yes, sir.
Q. Do you know young Spencer Martin?
A. Yes, sir.
Q. What kind of a fellow is he?
A. He's a very nice young man.
Q. Was he around your house when Sean was growing up and what not from time to time?
A. Yes, sir.
Q. Do you recall him saying that he saw a box that had Red Man on it that was in a grocery sack in your house at some time or other?
A. Yes, sir.
Q. Did you ever buy any chewing tobacco or snuff for any of your kids?
A. No, sir.
Q. Have you got any explanation? You are not telling this jury that Spencer Martin didn't see that or anything like that, are you?
A. No, sir, I'm not.
Q. Do you recall Spencer mentioning that he just saw the box?
A. Yes, sir.
Q. That he didn't see what was in it?
A. Yes, sir.
Q. Do you have any explanation for what it is

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that Spencer may have seen in the grocery sacks and how it got there?

A. Yes. He may have seen a box, a tobacco box, because frequently, not all the time, but frequently where -- this store in Talihina will use boxes to pack things rather than bags, and I don't know what was in the box at the time, I know it wasn't tobacco, but it may have been candy bars or the little snack cake. That's the only --

Q. But as you sit here, you are telling this jury that you have never bought tobacco for Sean?

A. No, no, sir.

Q. During the year that Sean was living in Talihina, that last year, --

A. Yes, sir.

Q. -- while he was living down there with his younger brother and they were finishing high school, --

A. Yes, sir.

Q. -- did you ever have occasion to take some affirmative action to keep him from charging his snuff to any of your credit accounts?

A. Yes, sir.

MR. JENNINGS: If the Court please, we object to this. It cannot be in rebuttal.

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THE COURT: Overruled. Go ahead.

Q. (BY MR. BRALY) Did you ever take any firm active steps to do something about that?

A. Yes, I did.

Q. Tell the jury what it was.

A. It was probably like in January after the boys went down in August, and I went to pay their bill at the drugstore and I found cans of snuff and some other things on there, and I asked them -- I don't know if it was myself or my daughter, Melissa, but one of us went to the drugstore and asked them not to put any more tobacco products on the bill.

MR. BRALY: I don't have anything further, Your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. JENNINGS:

Q. Mrs. Marsee, do you have any specific recollection of bringing things home from the grocery store in a tobacco box?

A. No, I do not.

Q. So you don't even know whether that happened or not?

A. Not for sure, no, sir.

Q. If it did happen, you don't know what was in

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it?

A. That would be the only thing I could think would have been in it, would have been some things, small items that we would have bought.

Q. But you don't even know that you even brought home a box; is that right?

A. No, only what Spencer says.

MR. JENNINGS: Thank you.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. BRALY:

Q. Mrs. Marsee, do you have a recollection of the grocers packing things in small boxes down in Talihina?

A. Yes, sir.

MR. BRALY: Nothing further.

THE COURT: You may step down.

Do I understand your witness is not available right now?

MR. BRALY: Yes. He's probably someplace over Eastern Oklahoma in an airplane right now, my guess, Your Honor.

THE COURT: What time would you expect him to be here?

MR. BRALY: I doubt seriously he can be here

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before the noon break, but I would expect to be able to put him on promptly at 1:15, Your Honor.

THE COURT: All right.

Ladies and gentlemen, we will go ahead and recess now until 1:15. I anticipate we will finish the testimony this afternoon in the case, so again let me repeat, you still haven't heard all of the evidence, so don't make up your mind until you have heard it all. Don't read or listen to anything about the case while we are on recess, and don't discuss with anyone or let anyone discuss the case around you, and we will see you back here at 1:15.

Everyone remain seated until the jury exits at 1:15.

(The following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY.)

MR. BRALY: Your Honor, with the Court's permission we would like to make a further record on the testimony.

THE COURT: Fine. Go ahead.

MR. BRALY: Your Honor, we had anticipated further rebuttal witnesses. I would like to make a formal offer of proof.

THE COURT: All right.

MR. BRALY: We would make an offer of proof

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by testimony from Doctor Greg Connolly. He is a dentist and a public health officer for the State of Massachusetts. I believe he holds a graduate degree in public health from Harvard, and the testimony that that witness would present in this case is that he has been preparing a case series with respect to young people --

MR. JENNINGS: Excuse me. If the Court please, I don't feel that it is necessary that this offer of proof be made publicly. I think it is a matter for the Court to consider only.

THE COURT: Come up.

(The following proceedings were had AT THE SIDE BAR.)

MS. DESCHAMPS-BRALY: Your Honor, before we get into this, might I ask the Court, assuming that we do finish testimony this morning, are we going into final arguments and charging the jury tomorrow morning, or what does the Court plan?

THE COURT: Well, let's see, I don't expect -- we have already recessed until 1:15.

MR. BRALY: Yes.

THE COURT: I would like to do them all, yes, tomorrow morning is what I would anticipate doing.

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MS. DESCHAMPS-BRALY: Okay.

MR. JENNINGS: That's fine.

THE COURT: I like to both have argument and instructions the same day.

MR. BRALY: Yes.

THE COURT: I don't like to cut them up if it is not necessary.

MR. BRALY: Actually, Greg Connolly is on the way and going to be here. I would prefer to let him make an offer of proof by question and answer at an appropriate time this afternoon, unless there is some reason not to, if that would be --

THE COURT: That's fine.

MR. JENNINGS: That's appropriate.

MR. BRALY: I would prefer to do that.

In addition, we would propose to call Tom Glass. Doctor Glass would testify that he is seeing an epidemic of precancerous lesions in young people as a result of the use of snuff. He would testify that this has only started in the last few years, since large numbers of young people have been using snuff.

He would further testify that this disease is squamous cell carcinoma, that it in Sean Marsee was a Grade 2 disease, that that is a typical

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squamous cell carcinoma in younger snuff users, including tongue cancer cases among older snuff users whom he has seen and biopsied and diagnosed himself. That he has with him and would present for the jury and the Court's consideration slides of lesions on the sides of the tongues of snuff dippers that he has diagnosed and treated that look very similar to those of Sean Marsee's; that snuff dipping does cause cancer of the tongue as well as cancer of the cheek and gum. That as recently as the last two weeks, he has seen a snuff dipper's lesion in a 12-year-old that had used snuff for as short a period of time as two years and that that lesion had premalignant changes in the tissue when it was biopsied.

MS. DESCHAMPS-BRALY: Had a malignant cell in the biopsy.

MR. BRALY: Yes. All of that to rebut the implication of any evidence that they have presented that Sean Marsee didn't use it long enough in order to cause cancer.

In addition, we would present --

THE COURT: Why don't you let them respond to Doctor Glass.

MR. JENNINGS: If the Court please, it seems to me that this is the testimony on the issue that

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the plaintiff raises in the lawsuit and should have been presented in chief. What Mr. Braly is saying, in effect, is that they put on evidence and then we defend ourselves, then that gives them the right to add cumulative evidence as rebuttal evidence so that they will have the last word.

THE COURT: Well, I -- go ahead.

MS. DESCHAMPS-BRALY: Your Honor, to add to the record, I would say that there are many things that we could have presented in our case in chief. I understand that Your Honor gave us great leeway in the amount of time that we could take, that Your Honor asked us to limit the number of witnesses that we had listed, that we did, in fact, do so.

We do not know what the precise defense is going to be until we hear it. It is very hard for a witness to say, well, it wasn't -- that it wasn't in the right place is not the ultimate factor because of this, that the age wasn't right, ta-da, ta-da, when they don't know what defense experts are going to say ahead of time.

They have to be able to come back and say, "Well, the factors that the defense gave were this and this and this and this." That is why we don't think that is right.

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How can they do that ahead of time when they don't know what those witnesses are going to say? All they said, it is our opinion that it was caused for these reasons, but they have no way of rebutting ahead of time what the defense is going to say when they haven't heard it.

MR. JENNINGS: I thought that was the purpose --

THE COURT: I am just satisfied that everything that I heard Mr. Braly recite that Mr. Glass would testify to has been adequately covered in the plaintiff's case in chief. I don't think there is an issue which you discussed that he would testify that you didn't present some testimony on.

Certainly the defendants offered evidence to the contrary. I don't think there was anything that I know of, maybe you can tell me if there was, that was a surprise in the defendant's case. I think it has been pretty well-known their position all along, and rebuttal is for the purpose of rebutting something specific that was raised by a defense witness that could not have been anticipated, and I just don't see that that does that.

MR. BRALY: All right. Well, we take the position that this disease being a different disease

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is a clear surprise.

THE COURT: All right. I said yesterday I thought that might well be, and you are telling me today that that was raised by Doctor Westbrook.

MR. JENNINGS: Oh, absolutely.

THE COURT: You have got a transcript. I would like to see --

MR. JENNINGS: Yes, sir.

THE COURT: Is that the next witness you want to discuss?

MR. BRALY: Yes.

THE COURT: Let's discuss him then.

MR. JENNINGS: He's on his way.

MR. FINNEGAN: Could we just wait until Mr. Jennings --

MS. DESCHAMPS-BRALY: Our problem, Your Honor, is that we tried to limit the number of our witnesses and we did so, and yet they have had four or five pathologists -- I lost count. I am trying to be honest. I don't remember the precise number -- come in and say it is a different disease to our one little person who said it is a different disease. As far as the jury is concerned, all these experts on the defendant's side have said this, and maybe they had one person that made that comment.

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It looks like he's in the minority. Well, that's not in fact true. It is just that we have not presented those other witnesses.

MR. BRALY: They made it a central piece of their defense, Your Honor, when it wasn't a central part of the case.

MR. JENNINGS: Starting with this, Line 10, Page 87.

(Handed to the Court).

THE COURT: You must have different areas that you are wanting to allude to. This is your cross-examination, isn't it?

MR. JENNINGS: Yes.

THE COURT: You said, "You testified that in your opinion cancer in young people is no different from cancer in older people."

Is there another area where he says that?

MR. JENNINGS: Yes, on direct he said that, Your Honor.

THE COURT: If he said that, what more can he say?

MR. BRALY: Well, he can describe specifically the reasons why that's true, Your Honor.

MR. FINNEGAN: But that was for -- I mean that's for redirect, Mr. Braly. This has been

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covered by the witness. It has been covered in the cross, and bringing him back doesn't add anything to the substance of this matter.

MR. BRALY: Your Honor, I think it would clarify the point. I think it would be helpful to the jury. It was not a central or a key portion of the case in chief. The defense has chosen to make it a central portion of their case. It was not set out specifically in their contentions. The Court may recall that we filed rather extensive contentions and they filed about one page and a half of very uninformative contentions prior to this case. And --

MR. JENNINGS: Right near the end of his direct, I can find it in just a minute, Your Honor.

MR. BRALY: Besides that it is going to be embarrassing to send him back without testifying, Judge. I will never be able to get him as a witness, anymore.

MR. JENNINGS: Here we are. That is on direct examination, Page 111 to 112 in Volume 7, I believe.

MR. BRALY: Okay.

MS. DESCHAMPS-BRALY: That is in general, there is no difference. He doesn't say why. It was a minor point at that time. We didn't know that was

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going to be a central issue in the defense.

MR. BRALY: They have for instance testified that all these diseases are verrucous carcinomas that snuff dippers have.

MR. JENNINGS: We have not had anybody so testify, and I resent you continuing to say that.

MR. BRALY: Doctor Ackerman did.

MS. DESCHAMPS-BRALY: Doctor Ackerman.

MR. JENNINGS: Doctor Ackerman did not say that.

MS. DESCHAMPS-BRALY: He did, too.

MR. FINNEGAN: He did not. He did not.

MR. BRALY: He said the only cancer that snuff dippers got was verrucous carcinoma.

MR. JENNINGS: Let me assure you, Mr. Braly, what this witness testifies to, it is not what I have him testify. It is what he believes. I have not had any witnesses testify to anything. I have asked them questions, and they have answered them.

MR. BRALY: I have no response to your tone of voice. To the substance of what you said, Mr. Jennings, --

THE COURT: Let me consider this. It would certainly not seem to come classically under the subject of rebuttal if you brought it out from

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Westbrook and then they responded to it. How would it be rebuttal to come back and have him say the same thing again?

MR. BRALY: Well, it would be rebuttal to have him come back and give detailed explanation for it, Your Honor, and they have made an enormous issue out of this. And in spite of what Mr. Jennings says, my recollection of Doctor Ackerman's testimony was that these snuff dipper's cancers are only of the verrucoid variety, but they can be of the squamous cell variety. And Doctor Westbrook can clearly rebut that.

THE COURT: Let me think about that. He's on his way, anyway.

MR. FINNEGAN: If the Court please, verrucous carcinoma can only be determined by a pathologist, not a clinician. Doctor Ackerman is a pathologist. He did not say what Mr. Braly says he said. Even if he said it, Doctor Westbrook with his training as a pathologist cannot testify as to histology in verrucous carcinoma. It is a histological determination, Your Honor.

THE COURT: Maybe they want to bring Doctor Glass for that.

MR. FINNEGAN: That's a different study.

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MS. DESCHAMPS-BRALY: I am not a pathologist, but I rely on what pathologists tell me is what I told him, and that's --

THE COURT: Let's do this.

MR. BRALY: I have some more on this offer of proof.

THE COURT: Okay, go ahead.

MR. BRALY: We would call Byron English, a high school student from Seminole, Oklahoma. We pointed out to the Court in the case Byron English only came to our attention within the last ten days, maybe 15 days on the outside, after this suit had commenced.

MS. DESCHAMPS-BRALY: He contacted us. We did not contact him.

MR. BRALY: And we interviewed this young man, who, if allowed to testify, with this new and newly-discovered information, he would testify that when he was in the sixth grade that he became concerned that snuff-dipping might cause cancer, and he personally wrote a letter to Walt Garrison and asked Mr. Garrison whether this would cause him cancer or not and asked Mr. Garrison's advice on the subject, and that the response that he got from the United States Tobacco Company was a can of Happy Days

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in the mail.

MS. DESCHAMPS-BRALY: I might add on the record that his testimony will be that the reason he became concerned at such a young age is that a very influential white-haired gentleman had taken him under his wing and he spent most of his days with him, and the gentleman said to him, "Byron, if you don't quit this, you are going to do damage to your mouth, and you might end up getting cancer." And the gentleman's wife provided him with an envelope and the stationery to write the letter, and it has since become a hobby of his to write to famous people.

And he wrote and he said, "Mr. Garrison, I'm worried about such and such, and I would like to know how long I have, because I intend to quit dipping snuff six months before the time that you think it will take me to get cancer," and then he received a package of Happy Days back in the mail.

MR. BRALY: It really happened, Your Honor.

MR. JENNINGS: Really?

MR. BRALY: It came as a real surprise to us.

In addition, there is a former U.S. Tobacco Company employee by the name of Rick Newton, from Waco, Texas, who was in charge of sales for a number

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of counties, an area sales representative, and Mr. Newton only came to our attention after this case started. If allowed to testify, his testimony would be directly contrary to the testimony that Mr. Garrison gave on the witness stand when Mr. Garrison said that they always ID'd young people, that they had a company policy not to sell to young people. Mr. Newton would testify that he was never, as a company employee was doing sales, they were never told not to sell to minors until the publicity of this lawsuit came along.

MS. DESCHAMPS-BRALY: His is not testimony regarding actual giving free samples, but rather that he was never instructed by the company nor asked to sign a paper until sometime after the 60 Minutes program telling him that distribution and sampling should not be done to minors, that after the publicity began, he was then instructed no longer to wear the Skoal jackets and the type of paraphernalia that they wore to advertise the product.

MR. JENNINGS: I didn't understand when these witnesses came to their attention.

MS. DESCHAMPS-BRALY: They contacted us out of the clear blue sky.

MR. JENNINGS: When?

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MR. BRALY: Last two weeks.

MS. DESCHAMPS-BRALY: Two weeks ago and Byron English about a week ago.

MR. JENNINGS: If the Court please, they only rested their case a week ago.

THE COURT: Who brought up the issue? I know Mr. Garrison was called by the plaintiff, but did you explore the issue of company policy with him on that?

MR. JENNINGS: Yes.

MS. DESCHAMPS-BRALY: Your Honor, I was very careful when I drafted my direct examination of Walt Garrison, because there were only specific areas that I wanted to go into. That was one of the areas that I specifically avoided at that time. When they got up and started asking him about advertising and sampling, as Your Honor will recall, I got up and objected, and I said, "Your Honor, that is outside the scope of direct."

And Your Honor's response was, "They are going to hear this sooner or later on the defense side, so I will let him testify now about it," and let him go on. I objected one more time, and Your Honor said they are going to hear it, so let them hear it now.

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MR. JENNINGS: If the Court please, this came out during the presentation of the plaintiff's case and before the defendant had called a single witness.

MR. FINNEGAN: In addition, Your Honor, they had about ten witnesses that were going to testify about sampling, about receiving samples, that they called one or two of them, but they had eight or nine other witnesses that they chose not to call.

THE COURT: I agree with you on Byron English, that I think there has been adequate evidence about persons getting samples as minors, but as far as company policy, I did allow in the cross-examination of relative policy outside the scope of direct, if what you say is correct. I assume it is.

MS. DESCHAMPS-BRALY: Yes. In fact, they asked the defendant two weeks ago if we knew something then. As a matter of fact, Mr. Newton did not make up his mind until approximately the last week that he would testify because basically what he told me is "I am afraid if I get up there and tell my story that they are going to blackball me and I will never get employment again." But he finally said, "Well, I will do it anyway."

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THE COURT: What do you say?

MR. JENNINGS: If the Court please, I just don't see how the plaintiffs can be permitted as a last part of the trial to introduce evidence on a subject that has been thoroughly explored in their case in chief.

MR. FINNEGAN: They had three-and-a-half weeks to make their case, Your Honor. They have brought in numerous witnesses to testify about sampling and what we told the store owner, Calvin Smith, and now they just want to have the last lick with the jury on this point.

MR. JENNINGS: They already had testimony on that issue. They had a store owner testify that he was never told anything about not selling to minors by U. S. Tobacco.

MS. DESCHAMPS-BRALY: Your Honor, --

THE COURT: That he was what?

MR. BRALY: A company employee. He was an employee of United States Tobacco Company until April, was merely --

THE COURT: When was he employed?

MS. DESCHAMPS-BRALY: He was employed until April of this year for three years.

MR. BRALY: Until April.

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MR. JENNINGS: He was employed in April.

MR. BRALY: Until April.

MS. DESCHAMPS-BRALY: Until April, and he had previously worked for the company for three years before that.

THE COURT: You don't know when he went to work then. Sometime in '83, you said?

MR. FINNEGAN: Even then, Your Honor, it is really outside the scope of this lawsuit. I mean anything that he knows happened after Sean's cancer was diagnosed.

MS. DESCHAMPS-BRALY: Your Honor, it goes to the credibility of Walt Garrison, what Walt Garrison said, and they keep stressing the fact that this came in on direct. The only reason it came in on direct is because, in the case in chief, is because Your Honor permitted it. I objected to it, but it was let in anyway. This does not go to causation or whatever, but it goes to the fact that it was only after the 60 Minutes program and all the publicity of this lawsuit that they told their sales reps out there in the force "don't do this with minors."

And I think the jury can reasonably infer that, oh, yes, they may have been very careful around college campuses because they have got college

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officials and they have got parents there to worry about, but the guys that they have got out there on the road distributing their products, they don't have to worry about them, because they generally are not going to have to worry about the adults that were around.

MR. FINNEGAN: And you said this man was separated from the company within the last 60 days?

MS. DESCHAMPS-BRALY: Yes, in April.

MR. FINNEGAN: Well, I mean that's the first I have heard of it. When were you first contacted by him?

MR. BRALY: He called us --

MS. DESCHAMPS-BRALY: Approximately two weeks ago.

MR. BRALY: -- approximately two weeks ago.

MS. DESCHAMPS-BRALY: On a Friday or Saturday, something like that, would not tell me -- no, I take that back, Your Honor. Right before this trial started, he called me on the telephone. He told me who he was, gave me the information.

I said -- he would not even give me his first name, just told me he was Mr. Newton. I said, "Mr. Newton, where are you?"

"I am someplace in Texas."

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"Well, where in Texas?"

He wouldn't tell me. I said, "Now, Mr. Newton, at this point I understand that you are not being candid with me. You know, if you are calling me, why are you not giving me the rest of the information and why are you not giving me a phone number and a place where I can reach you and your first name?"

And he said, "Because I am afraid that if I say something, they will blackball me and I will never get another job again, and I don't know whether I am ready to take that risk. If I get ready to take that risk, I have your phone number. I will contact you again."

He contacted us approximately two weeks ago. It was either on a Friday night or a Saturday night up here. He tracked us down through the Ada office. And I said, "Are you ready to do it?"

He said, "I don't know." And he said, "I will not tell you where I live, but I will meet you in Gainesville, Texas."

THE COURT: I understand that. The point you are making --

MS. DESCHAMPS-BRALY: It sounds like something on TV, but this is the way it went.

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We met him at a cafe. He told us his story in Gainesville, Texas, and finally agreed, okay, this is what it is, and this is where he lived and this is my name. That was the first we knew.

THE COURT: Do you happen to have -- what would you want him to say, you would want him to say that he was employed and that it was not -- no one ever told him that they weren't supposed to sell to minors?

MS. DESCHAMPS-BRALY: Until after, I believe his testimony is until after the 60 Minutes program, and then they received a communication from the company for the first time, and I don't remember whether he said he had to sign something agreeing not to do it at that time. I don't remember the precise details.

MR. FINNEGAN: He was employed for how long?

MR. BRALY: Three years.

MS. DESCHAMPS-BRALY: After that he was told to quit wearing the paraphernalia that advertised the product, to wear regular street clothes.

THE COURT: Do you happen to have available Mr. Garrison's testimony on that?

MR. JENNINGS: Sure.

THE COURT: Can I look at that? I would

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appreciate it.

Who else?

MS. DESCHAMPS-BRALY: Doctor Bill Thurman.

MR. BRALY: No, let's -- we made a record. We have made a record on Bill Thurman. We will present a record on Greg Connolly when he gets here, preferably do it in the form of question and answer and so the record will be complete.

MS. DESCHAMPS-BRALY: All right. We were going to offer the testimony of a photographic expert who would testify that the pictures that Mr. Garrison talked about were of the exact same scene taken by, I don't know how they do it, taken by different cameras, but that it is the same horse trailer, et cetera, et cetera, and it was taken during the same period of time.

THE COURT: You put that testimony on.

MR. JENNINGS: They put that on, yes.

MS. DESCHAMPS-BRALY: Well, I cross-examined him on it, yes, and he said, well, maybe.

MR. BRALY: Judge, you talked about surprise. When we sent somebody Saturday and took one picture and then took another one the next Saturday and then Walt Garrison gets on the witness stand and is allowed to speculate that one of them

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was taken the year before.

THE COURT: Frankly, I think the time that he had examined all these pictures he conceded that probably it appeared that they were at the same time. I don't think that is even worth spending the time on. I certainly got the impression that he never changed his mind if they weren't different years.

MS. DESCHAMPS-BRALY: Then we were planning on recalling Kim Henley. She's the one that identified the photographs. Even when he conceded that, yes, it could have been the same year, he said because of such and such, this picture was taken first and this picture was taken second, and reversed the order in which she said that they were taken. She needs to get up there and explain, because he gave the precise reason being the blanket.

THE COURT: You don't need -- I will sustain it.

MR. BRALY: Judge, in addition, we need rulings on the National Institute of Health Consensus Conference.

THE COURT: Yes.

MS. DESCHAMPS-BRALY: And Cancer Advisory Board.

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THE COURT: You can get away from here, do it vocally. I would like to go over all the exhibits that --

MR. JENNINGS: That begins there. That is the beginning of his testimony.

THE COURT: Let's go over the exhibits, and you all may have some exhibits that have been offered that we haven't considered. I know the plaintiffs do. So let's get that cleared up, if we could.

You need to take a recess. Why don't we take a short recess. We will come back at 11:00 and take up the exhibits.

MR. BRALY: Thank you, Your Honor.

THE COURT: Court will be in recess.

(A brief recess was had.)

THE COURT: Have you all gone over the exhibits?

MR. FINNEGAN: Yes, we have gone over our exhibit list, Your Honor, and we do want at this time or whenever the Court is ready to move the admission of certain exhibits.

THE CLERK: Both sides have some.

THE COURT: Okay. Do you want to get your co-counsel.

MR. FINNEGAN: I am going to --

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THE COURT: That will take care of it.

MR. FINNEGAN: -- deal with this, Your Honor.

THE COURT: Mr. Braly, are you going to take care of it or are you going to get your co-counsel.

MR. BRALY: Oh, I think I can cover it.

THE COURT: Go ahead, Mr. Braly.

MR. BRALY: Your Honor, there is a small collection of exhibits here. They consist of cans of snuff that were identified by the chairman of the board, Mr. Bantle, during his deposition. We would offer those as exhibits.

THE COURT: What are the numbers of them? Have they been offered before? They were offered during his --

MR. BRALY: Well, they were presented to the jury during his deposition and the Court may recall that afterwards you said collect those documents and exhibits and we will take them up later.

THE COURT: Okay.

MR. BRALY: They consist of Plaintiff's Exhibit 172.

THE COURT: Hold on just a second, get Bantle's -- Was Bantle your last --

MR. BRALY: Next to the last company

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witness. We did Jerry Gilmartin and Hugh Foley afterwards, as I recall.

THE CLERK: It was on the 10th.

THE COURT: What?

THE CLERK: He was on the 10th, started after the Walt Garrison.

THE COURT: Okay. What was the number of it?

MR. BRALY: 172, 175, 173.

THE COURT: All right, I see, I have cans of snuff, I have got them 23-A, 23D, E, F.

MR. BRALY: Those were deposition numbers.

THE COURT: Deposition numbers.

MR. BRALY: I can get them here in order.

THE CLERK: 173 through 176 that's what it is.

MR. BRALY: 172 through 176.

THE COURT: All right. You have objections to some or all of these?

MR. FINNEGAN: We have no objection, Your Honor.

THE COURT: How about the -- I notice a Skoal Bandit.

MR. FINNEGAN: We have objected to that in the past. We don't think any of this is relevant,

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but we are not going to make a big --

THE COURT: Is there any reason -- bandits has not been in the case.

MR. BRALY: It has been admitted, Your Honor.

THE COURT: This Skoal Bandits?

MR. BRALY: Oh, that Skoal Bandit, I'm sorry.

MR. FINNEGAN: We will object to the Skoal Bandits. We won't object to the others, Your Honor.

THE COURT: Any reason why it should be in.

MR. BRALY: I wouldn't fight over that.

THE CLERK: The number is 172.

THE COURT: 172 through 175 will all be admitted. All right. What's next?

MR. BRALY: I have some documents from the Deposition of Mr. Bantle, which the first one is exhibit 135. The principal reason for that one was this graph and chart that's in the middle of it, which was shown to the jury.

THE COURT: 135. I don't show that ever having been offered. Is that -- I show a Plaintiff's 24, would that be -- do you know?

MR. BRALY: Well, it was presented during the deposition of Mr. Bantle.

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THE COURT: Is that the sales history of the product?

MR. BRALY: Pardon? It shows the growth of the product.

MR. FINNEGAN: If the Court please, --

THE COURT: You have an objection to this?

MR. FINNEGAN: Yes, Your Honor, we do.

THE COURT: What is the objection?

MR. FINNEGAN: If the Court please, may I just go through it entirely. What year is this from, Richard?

We have no objection to this.

THE COURT: What is the number of that?

MR. FINNEGAN: 135.

THE COURT: All right. Plaintiff's 135 will be admitted.

What's next?

MR. BRALY: One of the reasons the Court put off considering taking up this Bantle thing, there were a number of articles.

THE COURT: Papers, newspaper articles.

MR. BRALY: From the company's files.

THE COURT: Yes.

MR. BRALY: And they are for identification Exhibit 142-A.

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THE COURT: 142-A?

MR. BRALY: (Nodding yes). 143, 144, 145, 146, 147, 148, and 149.

(Handed to counsel).

MR. FINNEGAN: What is the purpose of these newspaper clippings, Mr. Braly?

MR. BRALY: Put the company on notice that a bunch of kids were using your products.

MR. FINNEGAN: If the Court please, I think there has been abundant testimony that the company knew that kids were using the product. I don't think that has ever been disputed.

THE COURT: Let me see -- just hand them to her, Mr. Finnegan, and then she can hand them to me.

Do we have dates on any of these? Some of them I know do have dates, I see one of them here's --

MR. BRALY: One of them was 1981 that I saw.

THE COURT: All right. 145, "Snuff Users Addicted To Chewing."

I'll tell you what I am going to do on these. I think the point you are offering these for is to show that they were aware that young people were using their product; is that correct?

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MR. BRALY: And in particular that they collected that information in their company files.

THE COURT: I am going to let in a couple of them. I am concerned, some of them that go into all sorts of medical aspects of it, and I know I have let in documents on the issue of notice on medical studies, but a newspaper article that goes into risks, I think that's getting a little bit far afield. I think you can accomplish your same goal by having the ones that just talk about their use of the product.

MR. BRALY: I don't have any problem in accommodating the Court on that.

MR. FINNEGAN: We have no objection to that kind of newspaper article.

THE COURT: All right. I will let in Exhibits 144 and 146, which are "Smokeless Tobacco Snuff Use Catchs On Like Fire With Teens, and "It Is Dip And Tuck For Some Students," I don't believe either of those go into the medical aspects of it. They do go into the fact of the use of it.

MR. FINNEGAN: What are the date of those, if the Court please?

THE COURT: Well, frankly, it doesn't show on either one of these what the date is.

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MR. FINNEGAN: If the Court please, for the purpose of notice if it is being admitted I think it probably should have.

THE COURT: Well, it should, but it doesn't have a date, but the ones that do have dates are rather inflammatory, so --

MR. FINNEGAN: If I have a choice --

THE COURT: Let's go to the other ones.

MR. FINNEGAN: Yes, Your Honor.

THE COURT: I think that would be a fair resolution. I will admit 144 and 146.

MR. BRALY: Judge, we are going to absolutely insist on having the inflammatory documents that Your Honor -- (laughter).

THE COURT: Let me give those back to Mr. Braly, and I will admit those.

What's next?

MR. BRALY: Judge, this exhibit right here was shown to the jury during Mr. Bantle's deposition.

THE COURT: What is the exhibit number on that?

THE CLERK: I think it is 153.

MR. FINNEGAN: 153,, Your Honor.

THE COURT: That was admitted or it was

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brought up do you remember when?

MR. BRALY: That was during Mr. Bantle's deposition that it was shown to the jury and put on the tripod.

THE CLERK: I don't show that it was ever admitted.

THE COURT: You mean offered?

THE CLERK: I don't, but --

MR. FINNEGAN: If the Court please, I believe that this -- the article itself has been admitted. Wasn't the article admitted?

MR. BRALY: If it was, I don't remember when.

THE CLERK: Do you know what number the article was?

MR. BRALY: Pardon?

THE CLERK: Do you know what the exhibit number of the article would be?

MR. BRALY: It would have been during Bantle's deposition.

MR. FINNEGAN: If the Court please, this was the subject of the stipulation with -- between plaintiff and defendant with regard to Lazarus.

THE COURT: I remember that.

MR. FINNEGAN: That was the stipulation

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indicating that Mr. Lazarus was called as a witness, he would testify about this article. I thought the article -- I thought the article has already been read to the jury, or the stipulation was read to the jury.

THE COURT: I believe that's right, that you stipulated as to the quotes from that, isn't that what it was?

MR. BRALY: That's correct. But the jury needs to document, just the fact that Lazarus said that he would have said these things doesn't help us without the underlying document.

THE COURT: Why don't you hand me, is there something in there other than his quote that you particularly want, or you particularly don't want?

Did he stipulate to everything in the document or just to what we had over here?

MR. FINNEGAN: The stipulation, Your Honor, is as follows: "The quoted portion of the newspaper story from George Lazarus presented to Mr. Bantle during his deposition may be introduced into evidence without objection by the defendant by stipulation that if called to testify, the author of the story, George Lazarus would testify that Louis F. Bantle made the quoted statements to George Lazarus. This

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stipulation along with the quoted portions may be read to the jury."

So that was the stipulation that they may read to the jury the quoted portions.

MR. BRALY: Judge, in the first place, if these articles right here are admissible on that same notice issue as newspaper articles, clearly this one, which is dated, back in 1977 is admissible for the same purpose.

No. 2, as I recall, the document was admitted during the course of Bantle's deposition, because I got permission from the Court to put it on the tripod and the jury saw it.

MR. FINNEGAN: Well, I don't recall whether it was admitted or not. I know that you did display it to the jury, but the plaintiff has entered into a stipulation with us, Your Honor, as to what they could do and not do with this particular article.

MR. BRALY: We never did say we were not going to offer the document, Mr. Finnegan.

THE COURT: I am going to sustain the objection to the exhibit. You can certainly use it in your closing, but there are matters in there that were not stipulated to and so I will sustain the objection.

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MR. BRALY: I can use it during closing?

THE COURT: Yes.

MR. BRALY: Thank you, Your Honor.

THE CLERK: You have got two more, that's one of them.

MR. BRALY: During Doctor Rohrer's cross-examination, there was Plaintiff's Exhibit 267, which was his journal article, dated 1982. We would offer it.

THE COURT: Whose cross-examination?

MR. BRALY: Doctor Rohrer, their witness, their dentist/master of science in pathology.

THE COURT: What is your position on that?

MR. FINNEGAN: Well, Your Honor, we believe that this is directly under the rule which excludes articles or learned treatises from being admitted into evidence. This is not an issue of notice. Mr. Braly can and has used this in cross-examining a witness, but we do not believe that because he has done that, that this article comes in and may be admitted into evidence.

THE COURT: When was it written?

MR. BRALY: 1982, Judge.

MR. FINNEGAN: 1982, Your Honor.

THE COURT: He was not an employee at that

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time, as far as an admission to be concerned?

MR. FINNEGAN: He has never been an employee, Your Honor.

MR. BRALY: No, but he was a scientist and it comes in if nothing else on the issue of notice just like the other treatises do, Your Honor.

THE COURT: Let me see, then.

(Handed to the Court).

THE COURT: I don't think this -- I am going to sustain the objection to Plaintiff's 267. I don't think this rises to the level of a scientific-type literature that put the defendants on notice. It is more of a discussion of studies which are already in evidence, and I don't think it will really add anything. Again, this was also used in cross-examination of Doctor Rohrer.

MR. BRALY: Yes.

THE COURT: And I think that's satisfactory use of it.

MR. BRALY: There is no reason I can't use it in closing, Your Honor?

THE COURT: No, there's not.

THE CLERK: You still have 209.

MR. BRALY: And 209 from Mr. Foley's deposition, Hugh Foley.

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THE COURT: What is that?

Do you have objection to it?

MR. FINNEGAN: I was about to take a look at it, Your Honor, and I would like to. I don't see what --

MR. BRALY: It is an American Cancer Society document that came from the files of the U.S. Tobacco Company.

MR. FINNEGAN: We certainly don't believe that an American Cancer Society document rises to the level of learned treatise, Your Honor.

MR. BRALY: It does if you are maintaining it in your file as far as putting you on notice.

MR. FINNEGAN: What is the date of that, do you know, Mr. Braly?

THE COURT: 1981.

MR. BRALY: Also, Your Honor, the Court may recall the connection in which it was offered was questions of Mr. Foley about a statement made in one of the other company documents where they had intended apparently to infiltrate the voluntary health organization so they could keep track of what they were doing.

THE COURT: I am going to admit this document and the reason being there is a statement in

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there, the implication is, that smokeless tobacco is safe. It's not" referring to their advertisement. I think that would go to the issue of notice, and I will admit Plaintiff's Exhibit 209.

THE CLERK: You still have 196.

MR. BRALY: The task force letter?

THE CLERK: Yes.

MR. BRALY: There is apparently one document missing Your Honor, it is one of the task force documents, and I don't know where it is right this minute. I have seen it up here.

THE COURT: Is that the National Institute of Health?

MR. BRALY: No, it was an internal company document, one of the task force documents. I believe the additional name was Political and Regulatory Environment. It came in in the Bantle and Per Erik Lindqvist depositions.

MR. FINNEGAN: If the Court please, I believe, as I recollect, we have discussed this document before, and I believe that the Court had looked at it and felt that there was a lot of material in there that would be extraneous or duplicative. I believe that the Court asked Mr. Braly to look to see if there was any page or

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particular section of that document that he felt he wanted to move its admission. Is that the document we are talking about?

MR. BRALY: It was one of a group of four of those documents and, as I recall, we withdrew two or three as one of a group of four or five documents and we withdrew two or three of those documents.

THE CLERK: It was on June 5th. You held it in abeyance.

THE COURT: Well, I don't see it.

Well, why don't you see if you can find it.

MR. BRALY: I will retrieve it and bring it back to the Court or get a copy of it.

THE COURT: What else?

MR. BRALY: The National Cancer Advisory Board and Consensus Conference Reports.

THE COURT: Where are they?

(Handed to the Court).

THE COURT: What is your position, Mr. Finnegan, on the National Institute of Health report?

MR. FINNEGAN: Your Honor, our position is that this is a judgment -- we are talking about the National -- the concensus conference.

THE COURT: The first one I asked you about is National Institute of Health, the consensus

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conference document stating --

MR. FINNEGAN: Our position is that doesn't fall within the exception to the hearsay rule which makes admissible findings of governmental bodies that do their investigation pursuant to law.

THE COURT: I agree with you on both of these. I think they are appropriate to be used as they have been used. I think they are -- it is not necessary to even burden the record with them, and you can certainly use them in closing, but I am going to sustain the objection.

Both of these appear to me to be not findings of a governmental body. They are reports arising out of conferences held by a governmental body, and I really don't think it rises to the level of a finding of a governmental body, and I am going to sustain the objection as exhibits.

MR. BRALY: Okay. Note our strenuous reurging of the admission of those documents.

THE COURT: If the jury requests that document, we can take it up again. I don't think they will.

THE COURT: All right. Is that everything?

MR. BRALY: Yes. At one point in time I understood Mr. Finnegan made a remark in passing that

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I wasn't sure the Surgeon General's Report had been admitted. I double checked, and it has been. I just wanted to make sure.

THE COURT: I believe it has.

MR. FINNEGAN: Which Surgeon General report?

MR. BRALY: The 1986 Surgeon General's report.

THE CLERK: We have got that one tape.

THE COURT: Yes, there is a tape, the one, the South -- Is it the South Padre tape?

THE FINNEGAN: No, it wasn't.

THE CLERK: The Business of Pleasure.

MR. FINNEGAN: The Business of Pleasure.

MR. BRALY: The Business of Pleasure.

THE CLERK: It is Plaintiff's Exhibit 144.

THE COURT: Does either side want that attached to the record as an exhibit? We played just a portion of that and we can describe for the record what was going on. There was some reason we didn't want it. Somebody didn't want it particularly as an exhibit, I think.

MR. BRALY: I would just as soon have it in. I would agree it conceivably will burden the record, although there are going to be so many videotapes in

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the record right now.

THE COURT: We are going to allow you to keep possession of those after the case anyway.

MR. BRALY: Yes.

THE COURT: So let's just go ahead and make it.

MR. BRALY: I think the Court described -- I am not sure the Court described this particular scene.

THE COURT: Let's just go ahead. What number would it be?

THE CLERK: 344 is what it was.

THE COURT: All right. It will be Plaintiff's 344. It will be admitted and the record should reflect all that was shown of that tape was a very brief section that showed a rodeo and showed someone appearing to be a U.S. Tobacco Company employee throwing cans of what appeared to be Copenhagen tobacco into the audience.

Would that adequately describe --

MR. BRALY: Yes.

THE COURT: -- what we saw?

MR. FINNEGAN: Yes, Your Honor.

THE COURT: Plaintiff's 344, that portion will be admitted.

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THE COURT: Is that everything, Mr. Braly?

MR. BRALY: Yes. I understand from Exhibit 243, which was the document that was presented to the witness yesterday about the one-and-a-half cans per week, I had understood that it was going to be admitted. She tells me it wasn't.

THE COURT: I don't think it was ever offered.

MR. FINNEGAN: If the Court please, I thought that Mr. Braly offered it and the Court examined it.

THE CLERK: That's right.

THE COURT: What --

THE CLERK: I show that it was offered but --

MR. FINNEGAN: We approached the bench; you examined it and decided he could use it and it would not be exhibited.

THE COURT: What was the number of --

THE CLERK: 243.

MR. BRALY: Exhibit 243.

THE COURT: Let me see it again. I show 243, and I have scratched it off.

(Handed to the Court).

THE COURT: Who did you cross-examine with

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this?

MR. BRALY: Doctor Furst with respect to the typical daily usage of snuff. It is a statement by the chairman of the board.

THE COURT: Oh, I think I did rule that that portion that dealt with the amount of cans that were used, you could use that, but the report itself wouldn't come in.

MR. BRALY: Okay.

THE COURT: All right. Mr. Finnegan?

MR. FINNEGAN: Your Honor, on plaintiff's case, I believe we moved the admission of an article from the scientific literature dealing with cancer of the tongue in young people. I have here eight papers, Defendant's Exhibit 66-A through 66-H. They are papers that have been displayed to the jury. There has been a great deal of testimony about these papers.

THE COURT: Let me ask Mr. Braly, I really thought about this a lot, this issue, and I think -- I don't think there is any law either way on it. I have read your brief. I don't remember whether you had a response on the thing. I don't know the answer to that. Do you care enough to object to them?

MR. BRALY: Well, I care enough to object,

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but let me tell or explain to the Court what my thoughts are on the matter. These articles are addressed only to the particular issue of tongue cancers, and in young people, and the literature that we presented was generally addressed to the issue of oral cancer as a result of the use of snuff. These articles are not responsive to that general question. As a matter of fact, there is not a single one of those articles that say snuff does not cause cancer, not a single one of them. And for that reason I think that they would tend to be confusing and very highly prejudicial to have them admitted.

If they were -- if there were articles, for instance, the article by Doctor Smith that he did back in 1975, if they had offered that one, it might have been a different matter, because it dealt with the subject matter generally and covered the subject matter of cancer and oral tobacco, but none of these do. And so I think for that reason that it would be prejudicial and we would object to it.

The other thing is, Your Honor, is that being charged with the knowledge of the literature is being charged for the purpose of requiring them to put warnings on, and all these articles, at best, do is to establish that there was a scientific

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controversy, but I think that the Court is satisfied, as well as we are, that they had a duty to warn of the scientific controversy; and so even if it establishes that there is some negative information out there, it doesn't relieve them of the duty to warn, which is the principal purpose for which these journal articles have been offered is on that issue.

THE COURT: Mr. Finnegan?

MR. FINNEGAN: Well, if the Court please, I think that if you look at what a manufacturer's duty is, it is a duty to warn based upon state of the knowledge, state of art, and we have said that we are charged with the medical literature and everything that is in the medical literature. We never said that we were charged with the bad stuff, what Mr. Braly suggests as the bad stuff.

Our charge is with state of the art, state of knowledge, and I don't believe that it is fair to single out 10, 20, 30 papers which suggest one conclusion and say, well, that's fine, but on the other hand, the papers which are inconsistent or contradictory to the papers that seem to be negative are, therefore, just ignored.

I think that we -- our duty is based upon the entire scientific literature at any given time

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and you have to determine what state of the art is. And state of the art would consist those papers which could be construed negatively and those papers which could be construed positively.

THE COURT: What obviously troubles me is we are talking about an exception to the hearsay rule, and I allowed in those negative articles on the basis that it constituted some notice to the defendant that they either knew about them or should have known about certain articles that would be considered derogatory.

MR. FINNEGAN: If the Court please, --

THE COURT: Go ahead.

MR. FINNEGAN: -- may we --

THE COURT: Just talking off the top of my head. Thank you.

MR. FINNEGAN: We opposed the admission of the articles on the theory of notice, because we felt that if it were let in on notice, then you really could let in articles, scientific articles, in any case on the same theory of notice. However, since the Court has ruled that they can put in their articles on the theory of notice, it is our feeling and belief that in fairness we ought to be able to put our articles in to the extent that they indicate

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that there is no association between snuff and cancer of the tongue, because, after all, this case really comes down to Sean Marsee and whether we had a duty to Sean Marsee to give him a warning and a warning about tongue cancer. That's what this case is all about.

Although Mr. Braly keeps saying that these papers don't conclude that tobacco or snuff doesn't cause cancer of the tongue, it is quite clear from these papers that there is no association between the use of tobacco and cancer of the tongue in young people. And that's what this case is all about, Your Honor.

MR. BRALY: Judge, this is why you are a judge.

THE COURT: Well, I really have -- as a matter of fact, I woke up in the middle of the night last night thinking about this very issue.

MR. FINNEGAN: So did I, Your Honor.

THE COURT: I think it's -- I have read all the cases on it. On the one side, the competing forces obviously are that it's hearsay and there is no evidence you relied on those.

To the contrary, is it fair to charge you with one set of papers and not let in what might be

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considered countervailing.

MR. BRALY: Judge, let me urge this. The Court made it very clear early on that when this issue came up that if they would put a witness on the witness stand and say we relied on these articles, that the Court would take that differently. And I don't have any problem with that. I thought it was a good idea and a fair resolution of it, but as the Court saw from the deposition of Doctor Richard Manning, this company has studiously avoided putting any knowledgeable person from the company on the witness stand, and I think the Court ought to stand by its original inclination.

These people, you advised them, you told them early on long before their case started that if they would put somebody on to say the company relied on these articles, that that would be a different issue, and they haven't done it. They have done it knowing the Court's original feelings on that matter, and I would ask and suggest to the Court that it stand by its original position on that.

MR. FINNEGAN: If the Court please, we have submitted interrogatory answers under oath where we have indicated that Richard Manning and his predecessor, Word Bennett, there has been a lot of

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testimony about Word Bennett before this jury, have been reviewing the scientific literature as it comes out. I don't think there is a question but that they were reviewing the scientific literature.

Now, there may be a question as to whether or not a tobacco chemist can evaluate the literature in the same way that Doctor Furst or a toxicologist could evaluate it, but I believe there is no dispute about the fact that the company was reviewing the scientific literature.

THE COURT: Well, I am going to -- I think just in the interest of fairness again, I am not sure what difference it makes, but I am going to allow it in. I think it would be a little unbalanced and unfair not to let the whole picture of what the scientific evidence was at that time, so I will let it in.

MR. BRALY: Can we get an instruction that there is no evidence that the company relied on these?

THE COURT: I think you can certainly argue that. What would those exhibit numbers be.

MR. FINNEGAN: 66-A is an article entitled "Visceral Squamous Cancer in Children."

THE COURT: Just give me 66-A through what.

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MR. FINNEGAN: 66-A through 66-H, Your Honor.

THE COURT: All right. Those will all be admitted.

What else?

MR. BRALY: Note our objection, Your Honor.

THE COURT: All right.

MR. FINNEGAN: Your Honor, we also have five articles which deal with cancer of the tongue in young people. These articles were published after Sean's cancer arose, but they are the same papers that have been the subject of testimony dealing with cancer of the -- I'm sorry, 78. We would like to add 66-K, 66-L, 66-M.

THE COURT: What are these now?

MR. FINNEGAN: These are also papers from the scientific literature dealing with carcinoma of the tongue in young people, similar to the documents that were just admitted, Your Honor.

THE COURT: Let me see them.

(Handed to the Court).

MR. FINNEGAN: I had segregated those documents. I thought they were after 1983, but they turn out to be before 1983, Your Honor. Those have been up on the chart.

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THE COURT: These would all fall under --

MR. FINNEGAN: Yes, they would.

THE COURT: -- the parameters of that. So it would be 66-A through 66-M?

THE CLERK: No. I don't think so.

THE CLERK: That's not totally right.

THE COURT: Why not?

THE CLERK: Some are not included in that. "I" is not included.

THE COURT: Just go down and tell me what are included.

THE CLERK: A, B, C, D, E, F, G, H, -- wait a minute.

THE COURT: K, L, M?

MR. FINNEGAN: Yes.

THE CLERK: K, L, M.

THE COURT: Those will all be admitted. What else?

MR. FINNEGAN: Your Honor, we next have --

MR. BRALY: Note our objection for all the same reasons, that they have not offered any specific evidence to show that they relied on any of those.

MR. FINNEGAN: Next, Your Honor, we have ten articles from the scientific literature which deal

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with experimental production of cancer in laboratory animals. These are the studies that have been done with snuff, which have been displayed on the charts for the witnesses to testify about. The jury has seen these. And these are papers by Doctor Peacock, by Doctor Dunham, Doctor Homburger and others that have been working with snuff and exposing laboratory animals to snuff.

THE COURT: Do these predate --

MR. FINNEGAN: These all predate Sean Marsee's cancer. I think the latest one here is Doctor Hirsch in 1981.

THE COURT: Now, --

MR. FINNEGAN: And we would move their admission, Your Honor, under the same rule.

MR. BRALY: The same objection. They are hearsay, Your Honor. There's no evidence in this case that this particular company specifically relied upon these specific articles, and they are hearsay, just that simple. There is not any specific issue in this case upon which they are relevant.

MR. FINNEGAN: If the Court please, I thought plaintiff's counsel had just said on the earlier submission that that was dealing with tongue cancer and not the broad issue of oral cancer, which

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the plaintiff has been talking about for three-and-a-half weeks. These papers here --

THE COURT: These are all post-1983?

MR. BRALY: No, pre.

MR. FINNEGAN: Pre-1983.

THE COURT: Pre-1987.

MR. FINNEGAN: Pre-1983.

THE COURT: What are the exhibit numbers?

MR. FINNEGAN: Let me read them off. 58-A, --

THE COURT: 58- --

MR. FINNEGAN: -A. 58-B, 58-C, 58-D, 58-E, -F, -G, -H, -I and -J.

THE COURT: All right. On the same basis, again, all of these have been discussed, and I think it would not be prejudicial and it might be fair.

MR. BRALY: Your Honor, I will point out that what apparently is going to be the result of this is that in every products liability case where a medical issue is presented is that all of the world's literature becomes admissible, and it guts the hearsay rule at that point. That may be, you know, what Mr. Finnegan is suggesting is the state of the law. If it is, it's new law.

THE COURT: Well, it just troubles me that

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the company is charged with the state of the law and to say that they are just charged with the state of the negative law and not the one that might be helpful to them, it seems an imbalanced presentation to the jury to me.

MR. BRALY: Well, it would possibly, except for the fact that the issue is whether they should have given notice, and the issue is whether there was a scientific controversy, and the tobacco company is admitting that there's a scientific controversy, and, you know, it doesn't add anything to the issue of whether there should have been notice, so far as I can tell.

THE COURT: Go ahead.

MR. FINNEGAN: If the Court please, my last exhibit is 66-O, which is an article by Doctor Smith entitled "Snuff Dipper's Lesion, a Ten-Year Follow-Up."

This is the one that Mr. Braly referred to just about five minutes ago that would be the kind of article we could admit if we moved its admission. This is a study in which they examined 15,000 snuff users and they followed 1550 for I believe a period of ten years, and Doctor Smith concluded that snuff used in this country cannot logically be considered

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as carcinogenic in view of the large number of patients who have used snuff for many years with no clinical --

THE COURT: What is the date of this?

MR. FINNEGAN: This is 1975, Your Honor.

MR. BRALY: Your Honor, --

THE COURT: Why is it any different?

MR. FINNEGAN: It isn't, but it fell not into a category that we had been dealing with up on the chart, Your Honor.

MR. BRALY: It has not been brought up in evidence.

MR. FINNEGAN: There's been testimony about this, Your Honor.

MR. BRALY: By whom?

MR. FINNEGAN: There has been -- Doctor Smith is one of the people who has also done animal work, Your Honor.

MR. BRALY: There has been no testimony about that article of any kind, Your Honor.

MR. FINNEGAN: The fact is --

THE COURT: Has someone testified about this?

MR. FINNEGAN: Yes, Your Honor. I will have to go back and look at the record.

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THE COURT: You better, because at the very minimum they need to be somewhat identified --

MR. FINNEGAN: As relying upon Smith.

THE COURT: -- as acceptable scientific --

MR. FINNEGAN: Okay.

THE COURT: -- type evidence.

MR. FINNEGAN: Yes, Your Honor. We will review the record and renew our application.

THE COURT: What else? Anything else?

MR. FINNEGAN: No, Your Honor.

THE COURT: All right. Let me tell you what I am going to do on these witnesses. I have gone back and I read what Walt Garrison said about -- on Page 2120 he says, "As long as I have worked for the company there has been a strict sampling policy that no one under the age of 18 is given a sample of the product."

That was over the objection of the plaintiff that it was outside the scope of direct examination, and I overruled it, saying it would have been appropriate in the defendant's case in chief, and I am going to allow you to call in this witness that would testify -- I don't want you to go into this concern about getting fired and all that.

MR. BRALY: No.

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THE COURT: I will allow him to come in and just testify that he has worked for the company for three years and that he was never told.

MR. BRALY: Okay.

THE COURT: The other thing is I think that would be appropriate rebuttal.

On Doctor Westbrook, he did just in one sentence mention the comparison of young people's cancers and old people's cancer, and I don't think it would be inappropriate for you to, again in a very limited manner, if he can show, testify that they are all not of the verrucous-type cancers, but they are -- I am talking about the old people's cancers are not all the verrucous type but are the more virulent strain.

MR. BRALY: Yes.

THE COURT: Again, I want it to be very limited --

MR. BRALY: I will do that.

THE COURT: -- because he's testified, and you have had your chance with him. I think that would be fair to allow that limited testimony.

MR. BRALY: Doctor Connolly is here. We would like to make his offer of proof, if we could, in the form of questions and answers.

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THE COURT: You want to do that right now?

MR. BRALY: Yes.

THE COURT: That's fine.

MR. BRALY: Doctor Connolly, would you come forward, please.

GREGORY N. CONNOLLY, D.D.S.,

called as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. BRALY:

Q. Doctor Connolly, state your name, please.

A. My name is Doctor Gregory N. Connolly.

Q. Where do you live?

A. [DELETED]

Q. And how are you employed?

A. I'm the Director of Dental Health for the Massachusetts Department of Public Health.

Q. Do you have any degrees in connection with public health?

A. I'm a graduate in biology from the College of Holy Cross, Worcester, Massachusetts. I received a Doctor of Dental Medicine from the Tufts School of Dental Medicine. I was a resident at the Veterans Administration for one year and received a certificate in general dentistry in a hospital

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setting, and I received a master's degree in public health, postdoctoral degree from Harvard University for Public Health in Boston.

Q. Doctor Connolly, have you had an interest in the health hazards of snuff during the course of the last several years?

A. In 1984 the Department of Public Health conducted a survey of five thousand high school students in Massachusetts. The survey found that 28 percent of the male high school students tried smokeless tobacco at least once and 12 percent of the male high school students were regular oftentime users. We received complaints from parents and from physicians and dentists as to what the department was doing to control this problem.

In 1983 the urban Northeast was targeted by the United States Tobacco Company for a promotion of a product called the Skoal Bandits and it was introduced into the Greater New York area, as well as areas of Massachusetts.

Q. Let me interrupt you a second, Doctor. I don't want to get into the marketing part of this too much right now. Let me ask you this question. Have you published or been an author in a publication that has been published on the subject of the hazards of

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smokeless tobacco?

A. On April 19th, 1986, the New England Journal of Medicine published an article which I was the principal author along with four of the coauthors entitled "The Reemergence of Smokeless Tobacco." It was a comprehensive review of the scientific evidence regarding the health risks associated with smokeless tobacco. It was based on two days of public hearings conducted by the Department of Public Health in February of 1985 on this topic.

Q. Doctor, in connection with your interest in this matter, have you recently commenced to do the research to pull together a case series of young oral cancer victims who are snuff dippers?

A. During our investigation of smokeless tobacco, we were informed either by parents, clinicians or interested persons of cases of smokeless tobacco and oral cancer among smokeless tobacco users below the age of 35. In turn, I contacted the American Association of Oral Maxillofacial Surgeons and the equivalent association for ears, eyes, nose and throat physicians in the country.

In March of this year I had an announcement published in the ENT Newsletter requesting assistance

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in preparation of this case series report. In May of this year, the American Association of Oral Maxillofacial Surgeons published a similar report, and I will enter into the record a copy of the announcement that was placed in the March newsletter of the ENT Journal.

Q. All right. Doctor Connolly, in connection with this effort, have you come across and been able to identify a series of cases involving young people with oral cancer that have been snuff users for which you think or believe have reason to believe that there is a connection between the use of their snuff and their oral cancers?

A. Yes. To date I have identified nine cases of cancer in young people who are under 35 who are users of smokeless tobacco. In my opinion four of those cases, the oral cancer was caused by extremely heavy consumption of moist snuff, and the two brands mentioned were Skoal and Copenhagen by the users. These lesions by and large were ulcerative lesions, they were aggressive, resulting in three of the four cases in multiple recurrences of those cases, and I am prepared to enter into the record medical records from those individuals.

I have a chart I could present, if you would

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like, where I have gone through these.

Q. For the purpose of what we are doing right now, let me continue a few moments, let the Court consider this.

Doctor Connolly, based on that experience and based on your clinical experience and your knowledge of what is going on -- let me ask a foundation question first.

Doctor, are you aware of any premalignant lesions that have been taking place in young snuff dippers?

A. Yes.

Q. Have you looked into it to see whether that is a widespread problem?

A. I have reviewed the scientific literature. I have examined -- just Tuesday night I examined a young man with an ulcerative lesion in the buccal pouch who was a heavy snuff user. I have another study in progress right now, the Journal of the American Dental Association, on the reversibility of snuff-induced leukoplakia. So, yes.

Q. Doctor, there has been evidence in this case that young people did not begin using snuff in large numbers until sometime during the last ten years. Do you have an opinion as to whether or not we are

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seeing a small epidemic of either these premalignant lesions, snuff dipper's lesions, or actual frank oral cancer among young snuff dippers?

A. It is my opinion that we are seeing an increased prevalence of oral leukoplakia in the country among young people using smokeless tobacco products. Given the extremely low incidence rate of oral cancer for this age group, and we are looking at a rate of five per one million, extremely low rate, the numbers I am seeing today are of high concern, are of high concern, and it is my opinion, again of those nine cases, that it is clear that use of smokeless tobacco induced the oral cancer in those individuals.

Q. (BY MR. BRALY) In these case series that you are talking about, have they only recently become available to you?

A. Those become available to me, yes. I would like to make a point, that if you look at the experiences with scrotal cancer among chimney sweeps, that is of the young males who do chimney sweeps, that prior to puberty you see cancer onset with those people. If you look at the experience with females being exposed to particular viruses through multiple sexual encounters at a very early age, you see an

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increase in the prevalence of cervical dysplasia among those individuals.

So, one can look at use of a carcinogen at a very early age and be very, very concerned, and I think that fortunately these cases are among people who began use of the product at a high level of nitrosamines at a very early age.

MR. BRALY: Thank you, sir.

Your Honor, we would ask the Court's leave to call this witness to establish that and to rebut this implication that these cancers only occur in old people that has been the principal centerpiece of the defendant's case.

THE COURT: Mr. Finnegan.

MR. FINNEGAN: We object, Your Honor, of course, as basically the case that they put in for three-and-a-half weeks before the jury. This witness really adds nothing to that case in chief.

THE COURT: I agree. I think it would have been relevant testimony to have been offered in the case in chief, as I see no particular reason why it wasn't offered in the case in chief.

MR. BRALY: Your Honor, --

THE COURT: I don't think it adds anything to what has been previously offered, and I don't

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consider it rebuttal. I think it would be unfair to, in effect, reopen the case in chief and in the rebuttal stage of the trial. I don't believe this witness was listed as a witness, was he?

MR. FINNEGAN: He's not, Your Honor.

MR. BRALY: Your Honor, we tried to get exactly the same information in through Doctor Westbrook. He had reviewed the medical records of a number of these same people, and we made an offer of proof at that time during our case in chief, and the Court refused that.

THE COURT: Well, as I stated yesterday, and I will state again and I so stated then, I thought that was inappropriate hearsay, where a witness who was specifically preparing that testimony for this proceeding as opposed to during the course of his profession, so that will be the order.

MR. FINNEGAN: Thank you, Your Honor.

MR. JENNINGS: Thank you.

MR. BRALY: Note our objection, Your Honor.

THE COURT: Thank you. Anything else?

We will be in recess until 1:15.

(The noon recess was here had.)

THE COURT: Be seated. Ladies and gentlemen, the defendants have rested their case

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and -- well, you have had one rebuttal witness, I have told you that before, I won't tell you again. You have an additional rebuttal witness, I believe.

MR. BRALY: Yes, we would recall Doctor Kent Westbrook.

KENT WESTBROOK, M.D.,

recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified as follows.

THE COURT: Remember you are under the same oath you were under previously, Doctor Westbrook.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. BRALY:

Q. Doctor Westbrook, welcome back to Oklahoma today.

A. Thank you.

Q. Doctor, since you left the witness stand, there has been some testimony about snuff dipper's cancer and there's been some testimony about the fact that or there's been some claims made that the cancer that Sean Marsee got was not a snuff dipper's cancer, a snuff dipper's cancer was somehow or another different. Can you tell us what kind of cancer does snuff cause?

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A. Well, I think that snuff causes, first, cancer of the oral cavity, somewhere within the mouth. It can cause cancer that has any type of gross appearance. In our particular study, where we had 55 ladies, 50 of whom dipped snuff, the gross appearance of the tumor in about half of them, it was an exophytic growth, growing outward.

Q. Let me stop you there a second. Would that be consistent with the kind of tumor that Doctor Ackerman described back in 1948?

A. That would be consistent with the warty growth or the verrucal type. It looked like verrucal cancer, it was growing outward.

Q. About what percentage of them were that kind?

A. About 5 percent of the ones that we saw.

Q. Tell us about the rest of the patients?

A. 30 -- 28 percent of the patients had just ulcers, just bunched-out ulcers, no outward growth at all, just simple ulcers, and the other 20 percent had some external growth and some ulcer component. So about half of them had an outward component, the other half all had at least some inward component, roughly. Now, under the microscope, whenever we biopsied those lesions, 10 percent of them had the

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appearance of what's called a verrucal cancer. I'm sure that by now you know that is the cancer that doesn't look like it invades, it is just a thick cancer. But the other 90 percent of our patients had invasive squamous cell carcinoma.

MR. JENNINGS: If the Court please, I want to object to this as not being in rebuttal testimony. Doctor Westbrook's paper has been introduced in evidence, all of this has been testified to at length by both direct examination by the plaintiff, by cross-examination by the plaintiffs of defendant's witnesses. This is not rebuttal testimony, and I object to it.

THE COURT: All right. Overruled.

Q. (BY MR. BRALY) Doctor, the pathology report on Sean Marsee said he had a squamous cell carcinoma, Grade 2. What does that mean?

A. That means that it is a fairly-well differentiated squamous cell carcinoma, and that it fits into the group that we say it said about 80 percent of our patients that had snuff dipper's carcinoma, the histology is similar to about 80 percent of our patients.

Q. Tell us how do they determine which grades that these cancers fall in by looking at the

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pathology specimens.

A. The grade is based on the percentage of cells that look very undifferentiated. If you have less than 25 percent of the cells under the microscope that are undifferentiated, it is called Grade 1. And by undifferentiated, we mean --

Q. Excuse me. What do you mean by undifferentiated?

A. By "undifferentiated," we mean that it does not look like the cell that it started from. The normal squamous cell is kind of a flattened cell. When it becomes undifferentiated, it looks bad, it becomes ugly looking under the microscope. So if they are less than 25 percent differentiated, they are called Grade 1; 25 to 50 percent Grade 2; 75 percent -- 50 to 75 percent undifferentiated Grade 3; 75 percent-plus Grade 4.

So what that means is that a Grade 1 or 2 looks like the cell that it comes from, most of the cells do. A Grade 3 or 4, most of them do not look like the cell that they came from. So his was a fairly well differentiated squamous cell carcinoma.

Q. Is that the kind of histiological grade of squamous cell carcinomas that you found in your study?

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A. That is the most common variety that we found in the patients that we studied.

Q. Doctor, is the tongue one of the right places to get snuff dipper's cancer?

A. Well, tongue cancer in all studies, 95 percent of the people that get tongue cancer have used tobacco in some form or another.

MR. JENNINGS: If the Court please, --

THE COURT: Sustained.

MR. JENNINGS: Object to this as not rebuttal.

THE COURT: Sustained.

Q. (BY MR. BRALY) Doctor, in your opinion, was Sean Marsee's tongue cancer, was it the ulcerative kind or the verrucous kind?

A. It was the ulcerative kind.

Q. All right. In your opinion, was Sean Marsee's cancer a snuff dipper's cancer?

MR. JENNINGS: If the Court please, we object to this.

THE COURT: Overruled.

A. I think that his tongue cancer was of the variety that can be caused by snuff.

MR. BRALY: No further questions.

THE COURT: Cross-examine.

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CROSS-EXAMINATION

BY MR. JENNINGS:

Q. Doctor Westbrook, you have testified previously in this lawsuit on May 23rd, did you not?

A. That's correct.

Q. You testified at that time about the paper you had written about the 55 women with cancer of the buccal mucosa and alveolar ridge; is that correct?

A. That's correct.

Q. And you made a study of those cases back in 19-- what, '80?

A. '75. It was published in 1980.

Q. And in that study you deliberately excluded any site in the mouth except the buccal mucosa and the alveolar ridge; is that correct, sir?

A. That's correct.

Q. And, Doctor, when you were here testifying on May 23rd, do you remember being asked about the papers on tongue cancer in young people?

A. Yes, sir.

Q. And do you remember being asked this question, and you giving this answer. "But you were about to say, I believe, Doctor, that as of the present time, based on the literature that we have been reviewing, there does not appear to be any

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identifiable cause of tongue cancer in young people?" And your answer was, "That's correct." Do you remember that?

A. Yes, sir, I remember that.

Q. And the next question "And do you know any literature to the contrary? And your answer was, "I know of no literature to the contrary."

Was that your testimony, Doctor?

A. That's correct, Mr. Jennings.

Q. All right, sir. You were asked further in that deposition, "Doctor, you testified that in your opinion cancer in young people is no different from cancer in older people. Is that correct?"

Your answer was, "I testified histologically, clinically, it is no different, but then I think later in the testimony I said in general I thought it was a more aggressive cancer than it is in older people."

Do you remember that testimony?

A. Yes, sir.

Q. Question, "The literature seems to indicate that a great number of people think it is a great deal different, doesn't it?"

And your Answer: "Well, I don't think that anyone says that it looks different under the

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microscope. "Question, no, I don't mean that, but it is a different -- and in your answer "I don't think that the literature indicates that it is different under the microscope or different in the way that it spreads or different in how it affects patients. The literature probably does say that most patients that the cure rate in young people is not as good as it is in older people and, therefore, that the disease is felt to be more aggressive. It is a question about whether maybe young people just don't recognize it or their doctors don't recognize it.

"Question. Doesn't the literature say that it is impossible to tell what causes it in most cases?" And your answer: "The literature that we have reviewed would indicate that the etiological factor cannot be determined in most cases of oral cancer in young people"

" Was that your testimony?

A. That's correct.

Q. All right, sir. And did you say further in connection with testimony about the paper of Doctor Son at Yale, and you were asked:

"How about that paper as a whole? Do you find that paper helpful to you in any way?

Answer: "Not really. I think it raises, as

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we say, we speculate it may be due to something unusual."

Did you testify to that, Doctor?

A. I think that's correct, Mr. Jennings.

Q. And that is something unusual was tongue cancer in young people, was it not?

A. That's correct.

Q. And as far as being able to determine the cause of tongue cancer in young people, it is a far different thing than your opinion as to cause of tongue cancer in older people, isn't it?

A. In general, that's true.

MR. BRALY: Thank you, Doctor.

THE COURT: Anything further, Mr. Braly?

REDIRECT EXAMINATION

BY MR. BRALY:

Q. Doctor, in your review of Sean Marsee's particular case, was there an obvious etiological cause for his tongue cancer?

A. In my opinion, yes.

Q. And what was that obvious etiological cause?

A. I think the fact that he had dipped snuff for seven or eight years was an obvious cause.

Q. Would you settle for six years, Doctor?

A. Six years, what -- whatever the actual date

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was.

Q. Thank you.

MR. BRALY: No further questions.

MR. JENNINGS: If I may, Your Honor.

RECROSS-EXAMINATION

BY MR. JENNINGS:

Q. Doctor, without reading it to you, do you remember what your testimony was as to when you came to the conclusion that tongue cancer was caused by smokeless tobacco?

A. I don't remember actually saying when I came to the conclusion that tongue cancer was caused by smokeless tobacco. I said that many years ago I decided that cancer of the oral cavity was caused by smokeless tobacco, and that when I reviewed this particular case, I was convinced that in this particular case that smokeless tobacco caused this particular tongue cancer.

Q. All right. So let me read to you, then, Doctor. "When did you reach the conclusion that snuff causes tongue cancer in young people?" And your answer was: "I think that to answer that I would have to say that our study was designed to study a very specific area of the mouth and did not include the tongue and the floor of the mouth.

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"Question. Exactly. Now, this case involves a very specific area of the mouth and a different one. Now, how did you come to the opinion that snuff-dipping causes cancer of the tongue in young people?

"Answer: I came to that conclusion really firmly after I reviewed this case.

"Question. That is what I thought. This was the first time you had ever heard of a cancer of the tongue in a young person, wasn't it?

"Answer: No, it wasn't the first time I had ever heard of a cancer of the tongue in a young person.

"When had you heard of one?

"Well, you know, they are reported in the literature, very small numbers.

MR. BRALY: Excuse me, Your Honor.

Q. Have you read some of those reports?

MR. BRALY: It is improper cross-examination. He needs to ask the witness a question, the witness will give him an answer and proceed, if the witness contradicts his answer.

Q. (BY MR. JENNINGS) Doctor, at any time that I read anything to you that you feel is being inaccurately read, I would appreciate it if you would

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help me.

THE COURT: I think the point, Mr. Jennings, is just to read his deposition, I agree, is improper, unless you are rebutting something he said. I think you need to give him an opportunity to answer your question and then if it is different from what he said previously, you can read that.

MR. JENNINGS: If the Court please, what I am rebutting is his statement as to when he came to the conclusion that tongue cancer in young people was caused by snuff.

THE COURT: Go ahead.

MR. BRALY: Your Honor, he's read about six questions and answers right in a row.

THE COURT: Go ahead.

MR. JENNINGS: Oh, I will read them one at a time, excuse me.

Q. (BY MR. JENNINGS) "Well, you know they are reported in the literature, very small numbers."

"Question: Have you read some of those reports?

"Answer: I have seen them. I don't remember reading them in detail."

That is your testimony, Doctor?

A. That's correct.

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Q. All right, sir. "Those reports reported that there was no etiological factor that could be identified with regard to those cancers, didn't it?

Your answer was: "That's true."

A. I think you are reading correctly.

Q. "Question: So you didn't come to a conclusion from reading these reports that snuff caused cancer to the tongue in young people, did you?

"Answer: That's true.

"Question. Good. You didn't reach that opinion until you got to this particular case; is that right?

Answer: As far as a firm opinion, that's true."

Was that your testimony?

A. I think that's correct.

Q. "Question. Well, any kind of an opinion.

"Answer: That's true."

Was that your testimony, Doctor?

A. I think so.

MR. JENNINGS: Thank you, sir.

THE COURT: Anything, Mr. Braly.

MR. BRALY: No, I think we have ground this grist as fine as we can, Your Honor.

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THE COURT: You may step down. You are excused.

THE WITNESS: Thank you.

MR. BRALY: Your Honor, we would next like to call Mr. Rick Newton. He, unfortunately, since we have gone through this flip-flop on him, is not yet available. We are trying to locate him to get him here. We had him lined up to be up here last night and then called him off. Otherwise, we have no other witnesses besides Mr. Newton.

THE COURT: Come up a minute.

(The following proceedings were had AT THE SIDE BAR.)

THE COURT: What, is he on his way?

MS. DESCHAMPS-BRALY: Your Honor, we have three different plane reservations made for him and we are presently trying to track him down to get him on one of those airplanes, the latest of which would get him about 3:30 this afternoon.

THE COURT: But you haven't found him.

MS. DESCHAMPS-BRALY: No, not since we walked over.

MR. BRALY: Judge, we had him scheduled to fly in on time until the thing happened yesterday and we released him. Consequently, I would suggest, it

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won't take 15, 20 minutes, as far as I'm concerned, and I'd suggest we go ahead and recess for 30 minutes, take care of the requested instructions, if we can find him, put him on the first thing in the morning.

THE COURT: Well, I want to have -- I want to have instructions and argument all in one day without testimony. If you can get him here this afternoon, I will let you put him on. Otherwise, don't bring him in. I don't think that's fair to disjoint it all up, and I don't think it is that important, anyway. As I said last night, I think you have pretty thoroughly hashed that issue. Even though -- is there any realistic chance of getting him this afternoon?

MS. DESCHAMPS-BRALY: I don't think so. I need to call on it.

MR. BRALY: Why don't you put the jury on hold for 20 minutes, and we will advise the Court if we can establish it firmly, and then we will turn the jury loose.

THE COURT: How would you all feel about closing arguments this afternoon?

MS. DESCHAMPS-BRALY: Your Honor, I didn't even prepare over lunch because you said not until

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tomorrow.

THE COURT: I did say that. You would rather not?

MS. DESCHAMPS-BRALY: I would rather not.

THE COURT: Are you the same?

MR. JENNINGS: It makes no difference one way or the other to me.

THE COURT: Well, let's do that, we will say give you about half an hour, and if you can't locate him, just cancel him.

MS. DESCHAMPS-BRALY: I will see what I can do. Thank you.

(The following proceedings were had IN OPEN COURT.)

THE COURT: Ladies and gentlemen, we are going to take a recess now and it will be for about half an hour, and at that time we may release you at that time until in the morning, but I will tell you at that time, so everyone remain seated while the jury exits for about half an hour.

(The following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY.)

THE COURT: I didn't ask counsel if you had any surrebuttal that you intended to offer.

MR. JENNINGS: Your Honor, no.

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THE COURT: You are ready to go home, everybody.

MR. JENNINGS: I have been ready.

THE COURT: Well, let's do this. Why don't you go ahead and visit with Cary, my law clerk, about the instructions. Maybe we can get those cleared up in the next half hour; then we can resolve the other issue.

We will be in recess.

(A recess was here had.)

THE COURT: Be seated.

Let the record reflect that I have sent the jury home for the afternoon to reconvene in the morning at 9 o'clock to hear the closing arguments of the parties. I haven't actually asked you, plaintiffs, other than for the witness that was not available, you rest?

MR. BRALY: Excuse me, I'm sorry. Yes, we rest, Your Honor.

THE COURT: All right. I think the record should reflect also that this morning I advised counsel, plaintiff's counsel, that they would be allowed to call two witnesses in rebuttal, that would be Doctor Westbrook, who testified, and was it Rick Newton, was that the fellow's name, Rick Newton?

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MR. BRALY: Yes, Your Honor.

THE COURT: Doctor Westbrook did testify. Rick Newton has not been able to be found, and thus is not going to be available as a witness. He might be available tomorrow; however, I consider his testimony so peripheral at this stage after the issue he would testify on has been thoroughly explored by both sides. I don't think it would add a great deal to this trial, and I just don't think he's a necessary witness at all, and I think it would be unduly prejudicial to have just one witness testify in the morning from one side after this delay just prior to closing arguments and instructions, particularly, when it is no more relevant than I find that his testimony would be.

So I am just going to exclude his testimony. And is there anything else that we need to take up? I think we have discussed that each side will have an hour-and-a-half for closing arguments. You will need to -- it is required that you take more in your opening closing argument than in your rebuttal closing argument, and you will need to advise the clerk as to how you want to be warned on your time.

Is there anything else that we need to

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discuss? You want to make a record, Mr. Jennings?

MR. JENNINGS: Yes, Your Honor. If the Court please, at this time both parties having rested, the defendant, United States Tobacco Company, moves the Court to direct a verdict in its favor for the reason that there is no substantial evidence to support the verdict in favor of the plaintiff. I am sure that the Court doesn't want to hear extensive argument, but I would point out to the Court that although there have been expert witnesses who have expressed an opinion with regard to snuff causing Sean Marsee's tongue cancer, there is no basis in the record for such an appearance.

There is no epidemiological basis for it, and all of the literature by the admission of all of the defendants' witnesses on the subject of tongue cancer in people under 30 years of age or people the age of Sean Marsee is to the effect that the cause of it is not known and that tobacco as an etiological factor, it does not appear to be present. And in spite of witnesses giving opinions off the top of their head to a different effect, those opinions are not supported by scientific evidence and, therefore, cannot support a verdict.

THE COURT: All right. In considering a

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motion for a directed verdict, the Court views the evidence in the light most favorable to the party against whom the motion is made. A directed verdict is proper only where the evidence and all the inferences to be drawn from it are so patent that minds of reasonable persons could not differ as to the conclusions to be drawn from it. And based on that standard, the motion will be overruled.

Anything else?

MR. JENNINGS: Further, if the Court please, the motion for directed verdict and the entire matter having been overruled, the defendant moves for a partial directed verdict on the claim of design defect and rather than burdening the Court with argument, I would like to present a memorandum in support of that motion.

THE COURT: Now, I know there is an issue in the instructions as to whether the word "design," that term "design defect" should be used as opposed to a formula defect. Are you making --

MR. JENNINGS: It goes beyond that, Your Honor. I understand that the instruction is not specifically going to mention design, but the objection or the motion goes to the concept of design defect on the basis that there is no evidence that a

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different design could have been employed, different formula, and produce the same product.

THE COURT: All right. You have filed -- that's fine, just leave it there -- you filed your motion.

MR. JENNINGS: I filed a memorandum in support of the motion.

THE COURT: All right.

MR. BRALY: Judge, if you will, I would like to make about a one-minute verbal response. I think I can point out something to the contrary fairly quickly. What I think they are saying Your Honor is assuming that the nitrosamines are carcinogenic, we didn't establish a safe level that could be obtained with Copenhagen snuff.

If the Court will look at this chart that shows nitrosomorpholine that we are talking about that is in Copenhagen and Skoal, the Court can see there is at least three brands of Swedish snuff that there was none that was detectable or measureable.

Therefore, I think that just by comparison between the different brands manufactured, that it is clear they could have made a snuff without that particular contaminated nitrosamine.

MS. DESCHAMPS-BRALY: Additionally, Your

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Honor, I believe one of their own witnesses yesterday testified that if it was feasible to lower the levels of nitrosamines in a product, that the defendant should have done so. That came from their own witness.

THE COURT: All right. I have not read the memorandum, and I will do so.

What else?

MR. JENNINGS: Nothing further, Your Honor.

THE COURT: Nothing further.

We will be in recess until nine o'clock in the morning.

Court will be in recess.

(Court was recessed until 9:00 a.m., Thursday, June 19, 1986.)

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